

Secretary's Order No. 2006-F-0047

**Re: Approving Proposed Regulation 3215, Horseshoe Crab Harvest
Moratorium, as a Final Regulation**

Date of Issuance: November 20, 2006

Effective Date: December 11, 2006

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") under 29 *Del. C.* §§8001 et seq., 29 *Del. C.* §§10111 *et seq.* and 7 *Del. C.* §6010 (a), the following findings, reasons and conclusions are entered as an Order of the Secretary in this proceeding. This Order approves proposed regulation 3215 as a final regulation, which will, beginning January 1, 2007, impose a two-year moratorium on the harvesting of horseshoe crabs.

The Department's Division of Fish and Wildlife ("DFW") prepared two regulatory options for the Department's consideration as final regulations. The approval of either of these options would allow Delaware to comply with its federal legal responsibilities established by the multi-state Atlantic States Marine Fisheries Commission ("ASMFC"). Option 1 includes proposed amendments to Department Regulations 3203, 3207, 3210, and 3212, which set forth the current Department regulations on horseshoe crabs under the Department's authority in 7 *Del. C.* 103, 1902, 2701, 2703 and Chapters 15 and 60. These regulations establish the seasons and areas, dredging restrictions, reporting requirements, license renewals, and an annual limit of 150,000 horseshoe crabs. Option 1 would make some reporting and other changes, and would reduce Regulation 3214's limit of 150,000 horseshoe crabs annually to a proposed limit of

100,000 male horseshoe crabs over a two-year period beginning January 1, 2007. Option 2 is a new proposed regulation 3215 that would impose a two-year moratorium on any horseshoe crab harvesting in Delaware. Based upon my review of the record, the Department adopts Option 2 as an appropriate and reasonable regulatory step to protect the environment consistent with the Department's statutory purposes. Unlike Option 1, Option 2 ensures that Delaware has undertaken the maximum regulatory effort to protect the horseshoe crab population and the migratory bird population that depends on horseshoe crabs for food. This action will protect Delaware's environment, including horseshoe crabs and the important and at risk migratory bird population. Thus, the Department approves Option 2's proposed regulation as a final regulation, and withdraws Option 1's proposed amendments.

This Order is based on a vast administrative record, including the public hearing record reviewed in the October 20, 2006, Hearing Officer's Report ("Report"), attached hereto as Appendix A. The proposed regulation approved by this Order was published in the September 1, 2006, *Delaware Register of Regulations*, and the final regulation is set forth in Appendix B hereto. The Report provides a thorough review of the record and the technical and scientific support for both options. These proposed regulations generated considerable public debate and comments. The Report reviews and summarizes the massive administrative record, including the public hearing held September 28, 2006, in Dover, Kent County. Both options were opposed by well-presented comments from those who will be harmed by Option 1's considerable decrease in the harvesting or the even greater harm from Option 2's total temporary ban on harvesting. This harm is an economic one based upon the privilege of conducting a business that is extensively regulated. There is no right to conduct such a business, particularly when it may harm the environment.

The Department adopts the Report's review of the record, but rejects its recommendation that Option 1 be adopted, as discussed on page 11 of the Report. The Report recognized that both options were well-supported in the record, and that the selection would be determined on how much protection horseshoe crabs should receive. The Department determines that horseshoe crabs should receive the maximum amount of protection as a temporary measure for two years, as opposed to the less protective measure of reducing the limits on the amount that may be harvested to meet the ASMFC minimum requirements to protect horseshoe crabs, which, in turn, will enhance the environment for red knots, a migratory bird that is at risk.

The Department's decision is made based upon a record that establishes the important need to protect the horseshoe crabs, which are one of the world's oldest species. The record shows that the horseshoe crab population in the 1990s was the subject of commercial over-fishing in the Delaware Bay, which is the epicenter for horseshoe crabs. This means that Delaware and New Jersey together need to act to preserve and foster the environment for horseshoe crabs. The regulatory action in Option 1 would result in a significant decrease in the number of horseshoe crabs harvested, but Option 2 will provide the most protection. New Jersey regulators opted for a moratorium, and the Department determines that Delaware should also impose a moratorium to allow consistent protection of the entire Delaware Bay.

The horseshoe crab provides an invaluable source of food for birds, particularly migratory birds. The record focuses on the significant decline in the red knot, which is a bird species that arrives in Delaware annually to feed upon horseshoe crabs. The record shows a reasonable basis to protect the red knots by protecting their food supply in Delaware. Thus, this Order will allow the complete protection of horseshoe crabs in

Delaware Bay for two years, which also will enhance the food supply available to the red knot and other migratory birds now and in the future.

The record shows in 2005 that Option 2 will result in a Delaware economic impact of \$111,970 to the 34 horseshoe crab license holders, and indirect impact to the eel and conch pot industries. Option 1 also will have a considerable impact based upon the reduction imposed on the harvesting. The indirect impact is from using horseshoe crabs as bait for eel and conch. The record also includes requests for Department action to provide some economic relief to the persons impacted. The Department supports such a mitigation effort, but the Department unfortunately does not have the authority to grant economic relief. The Department also takes this action based upon recent scientific developments, namely, a possible artificial substitute for horseshoe crabs' primary economic use as bait for eel and conch fishing. Thus, until such a promising scientific development fully is implemented, the Department takes this regulatory action because the record contains expert technical and scientific support that the long-term survival of the horseshoe crabs requires a short-term moratorium on their harvesting.

The Department finds that Option 2 is appropriate to adopt consistent with protecting the horseshoe crab from the threat from excessive fishing, recognizing that it may have occurred years ago when there was no regulation on the fishing. This action is consistent with the Department's duty to protect the environment not only today, but for the future. The Department is concerned that the protection of the horseshoe crab cannot wait, and that the Option 1's reductions may not provide sufficient protection. The environmental impact of continued harvesting will not be known for eight to ten years. Thus, this temporary action is appropriate to preserve the future economic viability of the Delaware fishing industry most impacted by this Order.

The Department finds that the proposed regulation 3215 is well supported by technical expertise and sound judgment, is consistent with the law and regulations, and has a reasonable basis. It is not arbitrary or capricious, but is appropriate as consistent with the Department's statutory purposes. Regulation 3215 will result in protecting an important natural resource from a known harm. The moratorium will allow the horseshoe crab time to recover from fishing prior to the Department's current regulations. The moratorium will protect 300,000 male horseshoe crabs and provide more food for the red knot in the Department's maximum effort to protect this migratory bird from environmental harm from a lack of food supply. The Department chooses to have the horseshoe crab eggs eaten by the migratory birds, as opposed to utilizing spawning horseshoe crabs as bait for eels and conch and this is a valid environmentally sound policy determination, albeit a temporary one. The two-year time period is reasonable and appropriate in order that the horseshoe crab population to increase to support an ongoing, vibrant fishing industry and allow the red knot more food supply and thereby protect this species.

In conclusion, the following findings and conclusions are entered:

1. The Department, acting through this Order of the Secretary, adopts Regulation No. 3215, as published as a proposed regulation in the September 1, 2006 *Delaware Register of Regulations* and as set forth in the Appendix B hereto, as a final regulation under 29 *Del. C. §6010 (a)* and withdraws the pending amendments;

2. The proposed regulation approved by this Order was developed consistent with the applicable law and regulatory standards, is supported by expert technical analysis and scientific studies, and has a reasoned basis for regulating the environment from the potential harm;

3. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations, held a public hearing in a manner required by the law and regulations, and considered all timely and relevant public comments in making its determination;

4. Approval of the final regulation is consistent with the Department's statutory duty to protect the environment in Delaware;

5. This Order and the final approved regulation shall go into effect ten days after publication in the next available issue of the *Delaware Register of Regulations*; and that

6. The Department shall provide written notice to the persons affected by the Order, as determined by those who participated in these Department proceedings at the public hearing, or through participation by the submission of timely and relevant written comments.

John A. Hughes
Secretary